# RECENT DECISIONS.

BANKRUPTCY—RIGHTS OF CONDITIONAL VENDOR. By an unrecorded contract goods were sold, the title to remain in the vendor until payment. The vendee went into voluntary bankruptcy. In Nebraska such a condition in a sale is void as against purchasers for value and judgment creditors. The National Bankruptcy Law of 1898, § 70*a* (5), provides that the trustee shall be vested with the title of the bankrupt to all property which "he could by any means have transferred or which might have been levied upon and sold under judicial process against him." *Held*, the vendor could not reclaim the goods from the trustee. *Logan* v. *Nebraska Moline Plow Co.* (Neb. 1902) 92 N. W. 129.

The court follows, though with some reluctance, *In re Pekin Plow Co.* (C. C. A., 8th Circ. 1901) 112 Fed. 308, a case of involuntary bankruptcy. The opposite result was reached in the Second Circuit, under a substantially similar New York statute. *In re New York Economical Printing Co.* (1901) 110 Fed. 514. Under the Act of 1867, except in the case of fraudulent conveyances and of certain attachments, the assignee obtained no right that the bankrupt himself could not have enforced. *Stewart* v. *Platt* (1879) 101 U. S. 731, 738. The broad construction here placed by the court on § 70*a* (5) seems objectionable in that by letting in the general creditors it frustrates the purpose of the State statutes to prefer only judgment and attachment creditors to the holder of the unrecorded lien.

CARRIERS—PASSENGERS—SCOPE OF SERVANT'S AUTHORITY. While riding on the front platform of a crowded street car, without objection from the driver, contrary to the company's rules and its instructions to employees, the plaintiff was injured through negligence of the company's servants. The jury found (1) that the servants of the company had no authority to permit plaintiff to ride on the platform; (2) that plaintiff was not negligent; and (3) that he had no notice of the rules. *Held*, the plaintiff could not recover. *Byrne* v. *Londonderry Tramway Company*, [1902] 2 Ir. 457.

The decision of the court is based on the first finding of the jury. While a disregard of instructions is not sufficient to relieve the company from liability, *Limpus* v. *Omnibus Co.* (1862) 1 H. & C. 526, a decisive inference of fact may arise that the servant disobeying orders is not within the scope of his employment. *Walker* v. *Railway Co.* (1870) L. R. 5 C. P. 640. The weight of authority in the United States is that if a conductor accept one as a passenger, he will be treated as such in the absence of knowledge on his part of limitations upon the conductor's authority. *Spence* v. *Chicago, etc. R. Co.* (1902) 90 N. W. 346. But it did not appear in the principal case that the conductor knew of the plaintiff's presence on the platform, and the evidence went to establish that it was considered "an offence" to ride there, not being a general practice, as in this country, where the opposite conclusion has been reached. *Wilton* v. *Middlesex R. R. Co.* (1871) 107 Mass. 108.

CARRIERS—PASSENGERS—DUTY TO PROTECT. Husband and wife were in a depot together, the former acting as escort and the latter waiting to take a train for which she had already purchased a ticket. While there they were both assaulted by a drunken man who had been allowed to enter the depot. *Held*, the husband, being merely a licensee, could not recover, but the wife, being a passenger, had a good cause of action. *Houston & Texas Central R. Co.* v. *Phillio* (Tex. 1902) 69 S. W. 994. See NOTES, p. 115.

CONSTITUTIONAL LAW—POLICE POWER—RIGHT TO BEAR ARMS. The Idaho constitution reads: "The people have the right to bear arms for their security and defence, but the legislature shall regulate the exercise of this right by law." An Idaho statute prohibited the carrying of deadly weapons within the limits of any city or town. *Held*, while prohibiting the carrying of concealed weapons would be a proper exercise of the police power of the State, an absolute prohibition was void as contravening the Second Amendment of the federal Constitution and the provision of the State constitution quoted. *In re Brickey* (Wash. 1902) 70 Pac. 609.

The Second Amendment restricts only federal legislation. *U. S.* v. *Cruikshank* (1875) 92 U. S. 542; *State* v. *Shelby* (1886) 90 Mo. 302. Under substantially similar constitutional provisions it has been held a proper exercise of the police power of the State to prohibit carrying of weapons not arms, *Andrews* v. *State*, (Tenn. 1871) 3 Heisk. 165; to forbid any tramp to carry a dangerous weapon, *State* v. *Hogan* (1900) 63 Oh. St. 202; to prohibit carrying weapons to courts of justice, *Hill* v. *State* (1874) 53 Ga. 472. To have upheld the statute in the principal case, would, it is believed, have been an unwarranted extension of the principle in *Hill* v. *State*.

CORPORATIONS—DUTY OF DIRECTORS. The shareholders of a company sold their stock to the directors, who, empowered by the company's charter, had arranged to sell all its assets. *Held*, the shareholders were not entitled to rescind the sale for the failure of the directors to disclose the fact of the pending sale of the assets. *Percival* v. *Wright*, [1902] 2 Ch. 421.

Though the directors of a corporation undoubtedly occupy a fiduciary relation with regard to the shareholders in managing the affairs of the corporation and in their dealings with it, this relation does not extend to transactions in which no interest of the corporation is concerned, as in a sale of shares to a director. The parties stand in the ordinary position of vendor and purchaser, and a director is no more restrained from profiting by the knowledge he obtains in his official capacity than is any vendee who is fortunate enough to have exclusive information, always supposing there is no actual misrepresentation. This principle is well established in the United States. *Tippecanoe County* v. *Reynolds* (1873) 44 Ind. 509; *Crowell* v. *Jackson* (1891) 53 N. J. L. 656. And it should make no difference whether the sale be by one shareholder, or as in the principal case, by all, as they are still acting purely in an individual capacity.

CORPORATIONS—INSOLVENCY—STATUTORY PREFERENCES. The charter of a trust company, in accordance with a State banking law, provided that certain depositors' claims should be preferred. *Held*, while these preferences take effect from the time a receiver is appointed, interest on the preferred claims, the corporation being insolvent, will not be allowed to the prejudice of the unpreferred claims. *People* v. *American Loan & Trust Co.* (§ 1902) 172 N. Y. 371.

The decision is eminently reasonable. In *Thomas* v. *Car Co.* (1893) 149 U. S. 95, 116, it is said, "As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate." The case of *Thomas* v. *Minot* (Mass. 1857) 10 Gray, 263, is in point. It was there held that the separate creditors of an insolvent partner were not entitled to interest, but the surplus should be applied in liquidation of the claims of the firm creditors.

CRIMINAL LAW—FORMER CONVICTION—VERDICT. On an indictment for larceny the defendant pleaded a former conviction for the same crime. There was no conflict in the evidence, and, on inspecting the record, the judge charged the jury they must return a verdict for the State. The jury in the face of his instruction returned a verdict for the defendant. *Held*, an order setting aside the verdict was valid; for the plea of former conviction did not go to the merits of the case, and the trial of the issue

did not place the defendant in jeopardy. *State* v. *Ellsworth et al.* (N. C. 1902) 42 S. E. 699.

As a rule, a verdict for the defendant in a criminal trial is absolutely final. Otherwise all further proceedings would be open to the objection that the defendant had once been placed in jeopardy. But the trial of the issue of former conviction is an inquiry into the nature and result of a former action against the defendant. No answer of the jury can convict him. Even if against him, the case must still be heard on its merits. Thus the reason for the rule fails, and the verdict should not necessarily be final. See *State* v. *Hager* (1900) 61 Kan. 504; *Martha* v. *State* (1855) 26 Ala. 72.

EMINENT DOMAIN—INJURY TO BUSINESS. *Held*, injury to an established business is not a taking of property in such a sense as to entitle its owner to compensation under a constitutional provision that private property shall not be taken for public use without just compensation. *Sawyer* v. *Commonwealth* (Mass. 1902) 65 N. E. 52. See NOTES, p. 112.

EQUITY—RAILWAY MORTGAGES—PREFERENTIAL DEBTS. The intervenor sold car wheels to the A railway company, in accordance with a previous course of dealing, on 60 days' credit, with knowledge that the purchaser intended to use them on the B road, of which it was the lessee. One year later bondholders filed a bill for foreclosure of a mortgage on the A road securing their bonds, and a receiver was appointed. *Held*, the intervenor stood in the position of a general creditor only, and its claim was not to be preferred to those of the bondholders and other secured creditors. *Southern Ry. Co.* v. *Ensign Mfg. Co.* (C. C. A., 4th Circ. 1902) 117 Fed. 417.

More than six months prior to the appointment of a receiver, a railway company bought jackscrews from the intervenor, for use upon a line of which it was the lessee. Within six months prior to such appointment, it bought jackscrews for use upon its own line. *Held*, the claim for the second sale was to be preferred to the claim of mortgage creditors, but that for the first was not to be so preferred. *Southern Ry. Co.* v. *Chapman Jack Co.* (C. C. A., 4th Circ. 1092) 117 Fed. 424. See NOTES, p, 111.

EQUITY—SPECIFIC PERFORMANCE OF BUILDING CONTRACT. The plaintiff conveyed land to the defendant railroad. Part of the consideration was the defendant's covenant to erect and maintain on this land a station of a certain character. *Held*, specific performance would be decreed as the terms of the contract were definite, the building was to be on the defendant's land, and the plaintiff would have no adequate remedy at law for the loss of the expected collateral benefit. *Murray* v. *Northwestern R. Co.* (S. C. 1902) 42 S. E. 617.

As early as Year Book 8 Ed. IV. 4, it was held that specific performance of a contract to build could be decreed. But the adequacy of the plaintiff's remedy at law, as he could get the work done by someone else, as well as the difficulty of supervision, afterwards led the courts to refuse to take jurisdiction in the case of an ordinary building contract. *Errington* v. *Aynesly* (1788) 2 Bro. Ch. 341; *Lucas* v. *Commerford* (1790) 3 Bro. Ch. 165. Where, however, the building is to be done on land conveyed to the defendant as consideration the plaintiff can get the expected benefit in no other way; and in such cases the courts do not find insurmountable the difficulty that supervision of the construction or even of indefinite maintenance is involved. *Hood* v. *N. E. R. Co.* (1869) L. R. 8 Eq. 666; *Gregory* v. *Ingewesen* (1880) 32 N. J. Eq. 199; *Lawrence* v. *Saratoga Lake R. Co.* (1885) 36 Hun, 467; *Jones* v. *Parker* (1895) 163 Mass. 564.

INSURANCE—ALIEN ENEMY—SEIZURE BY ENEMY'S GOVERNMENT BEFORE BEGINNING OF WAR—PUBLIC POLICY. August 1, 1899, a British subject insured gold of a Transvaal corporation during transit to England, "against arrests of all kings, princes, and peoples whatsoever." October 2, the gold was seized by the Transvaal authorities. October 11, war broke out. *Held*, as seizure antedated the war, this was not insurance

of an alien enemy, and the insurer was liable, public policy not being a ground for extending the rule against insuring alien enemies to cover seizure in contemplation of war. *Janson* v. *Driefontein Consolidated Mines, Lim't'd*, [1902] A. C. 484.

*Conway* v. *Gray* (1809) 10 East, 536, held that an alien assured could not recover for seizure by his own government. *Aubert* v. *Gray* (1862) 32 L. J. Q. B. 50, held that this principle applied, if at all, only to seizure during or in contemplation of war. The present case overthrows what is left of the doctrine. The House of Lords takes sound ground in limiting public policy as a basis of judicial decision, and the result is in line with *Richardson* v. *Mellish* (1824) 2 Bing. 229; the case must be taken as limiting the scope of public policy as laid down, contrary to the advice of the majority of the judges, in *Egerton* v. *Brownlow* (1853) 4 H. L. C. 1.

INSURANCE—BENEFICIARY AND INSURER—DEATH IN SAME DISASTER—BURDEN OF PROOF. A member of a fraternal beneficial association named his wife as the beneficiary. Should the beneficiary die before the insured, the by-laws of the order provided that the fund should be paid to the insured's next of kin. Insured and beneficiary perished in the same disaster. *Held*, on interpleader, the burden is on the representative of the beneficiary to prove that she survived her husband; otherwise the fund goes to the insured's next of kin. *Middeke et al.* v. *Balder et al* (Ill. 1902) 64 N. E. 1002.

This undoubtedly is in accord with the great weight of authority. *Southwell* v. *Gray* (1901) 35 N. Y. Misc. 740; *Cade* v. *Head Camp, etc.* (1902) 67 Pac. 603. But it is open to criticism. The designation, by the by-laws, of the next of kin as beneficiaries in the alternative, is part of the contract of insurance. They do not take by descent, because, if this alternative were not provided for, and the insured after the death of the first beneficiary should fail to designate another, the fund would go to the beneficiary's representative. *Thomas* v. *Cochran* (1899) 89 Md. 390; *Hooker* v. *Sugg* (1889) 102 N. C. 115. Therefore, the next of kin being beneficiaries in the alternative, the *prima facie* right is in the designated beneficiary, and the burden should be upon the next of kin to prove the prior death of the wife. *Cowman* v. *Rogers* (1891) 73 Md. 403.

INTERNATIONAL LAW—EXTRADITION. In *habeas corpus* proceedings it appeared that the prisoner was arrested and held for extradition to England for an offence alleged to have been committed at Johannesburg, in the Transvaal, on or before January 1, 1900, and before Lord Roberts' proclamation of annexation. *Held*, (1) the court may go behind the assertion of territorial jurisdiction contained in the complaint; (2) the South African Republic was not within the territorial jurisdiction of England prior to the proclamation; and (3) the provision in the treaty of 1889 for extradition for offences "committed within the jurisdiction" of either party does not include offences committed in territory prior to its acquisition. *In re Taylor* (D. C., D. Mass. 1902) 118 Fed. 196.

The result reached is in line with former constructions of extradition treaties, giving to the term "jurisdiction" a narrow definition, established by the executive rather than by the judicial department. *In re Joseph Stupp* (1873) 11 Blatch. 124 and note; 1 Phill. Internat. Law, 413. It would seem, however, that the quality of extradition as a mere process has not been sufficiently noticed. An extradition treaty is not a criminal statute requiring strict construction.

MUNICIPAL CORPORATIONS—MISCONDUCT OF MEMBERS OF CITY COUNCIL. *Held*, in letting a contract for the improvement of streets, the board of aldermen of a city acts in an administrative, and not in a legislative capacity, and hence its action may be collaterally attacked on the ground of bribery. *Field* v. *Barber Asphalt Pav. Co.* (C. C., W. D. Mo. 1902) 117 Fed. 925.

While the general rule, that the courts will not investigate the motives of the legislature in the enactment of statutes, *Fletcher* v.

*Peck* (1810) 6 Cranch, 87, applies also to the jurisdiction over city ordinances, Dill. Mun. Corp. (4th ed.) § 311, yet an exception to this application has grown up of late years. Dill. *ibid.* §§ 311–312. The tendency now is to limit the rule of *Fletcher* v. *Peck* to ordinances passed in the exercise of the police power and for other purposes of government, and to exclude from its protection grants of franchises and contracts. *Davis* v. *The Mayor, etc.* (1853) 1 Duer, 451; *State* v. *Gas Co.* (1868) 18 Oh. St. 262; *Gravel Co.* v. *New Orleans* (1893) 45 La. Ann. 911. Under the statutes of New York allowing "tax-payers' actions", there is no doubt of the jurisdiction. *Weston* v. *Syracuse* (1899) 158 N. Y. 274. In *Davis* v. *The Mayor, supra*, the board of aldermen was enjoined from the passage of an ordinance.

NEGOTIABLE INSTRUMENTS—PRESENTMENT OF CHECK THROUGH CLEARING HOUSE. *Held*, where the payee receives a check in the place where the bank on which it is drawn is located, in the absence of special circumstances he must present it, in order to hold the drawer, not later than the day following its receipt; and this, even though the business usage of the community is to have checks collected through a clearing house. *Edmisten* v. *Herpolsheimer* (Neb. 1902) 92 N. W. 138.

The first part of the decision is settled law, where it is customary for the payee to make a personal presentation. Daniel, Negot. Instr. § 1590, and cases cited. And it has been so held where the clearing house system is used. *Holmes* v. *Roe* (1886) 62 Mich. 199. But this rule is based on the earlier rule that presentation must be made within a reasonable time. Chitty, Bills of Exchange, 403. Where, therefore, the clearing house system is the business usage of the community, the delays attendant upon such usage should be taken into account. *Loux* v. *Fox* (1895) 171 Pa. St. 68. A recent English case, *Edelstein* v. *Schuler*, [1902] 2 K. B. 144, well points out how the law of negotiable paper must conform itself to business usage and change with the varying circumstances of commerce. The Negotiable Instruments Law (§ 322 of the New York Statute) merely requires a reasonable time, and in defining reasonable time provides (§ 4) that regard be had to business usage.

PARTNERSHIP—PROPERTY—SHARES IN JOINT-STOCK ASSOCIATION. Interests in land are exempt from transfer taxes by N. Y. Laws 1891, c. 215, § 1. Forty-six of the one hundred shares in the New York Times Association, a joint-stock association, had been devised, and in estimating their value in order to impose the transfer tax the appraiser had taken into account the value of the Times building. *Held*, this was not error, for shares in a joint-stock association are personal property, although the property of the association is real estate. *Matter of Jones* (1902) 172 N. Y. 575, reversing 69 App. Div. 237.

The decision is believed to be correct. See 2 COLUMBIA LAW REVIEW, 403, where the decision of the lower court is commented upon.

PARTNERSHIP—RIGHTS IN EQUITY OF PERSON NOMINATED FOR MEMBERSHIP ACCORDING TO POWER IN PARTNERSHIP AGREEMENT. Articles of partnership for a definite period gave to one partner the right to nominate a son into the firm. The son duly presented himself, but the other members refused to receive him. *Held*, upon a bill by the nominating partner, joining the son and the dissenting partners as defendants, that equity, while not decreeing specific performance, would administer in behalf of the son the remedies usually afforded to partners, and would order execution of a partnership deed recognizing the son as a member of the firm. *Byrne* v. *Reid*, [1902] 2 Ch. 735. See NOTES, p. 108.

PERSONAL PROPERTY—"POSSIBILITY ON A POSSIBILITY." A marriage settlement transferred personalty in trust for husband and wife for life, then for their children or any such issue, born in the lifetime of the original beneficiaries, as they should appoint. *Held*, an appointment to children for life with remainder to grandchildren born in the lifetime of

the original beneficiaries, was good. The rule against a "possibility on a possibility" does not apply to limitations of personal property. *In re Bowles*, [1902] 2 Ch. 650.

The point seems never before to have been squarely decided. In *Whitby* v. *Mitchell* (1890) 44 Ch. Div. 85, the Court of Appeal held that the modern rule against perpetuities did not supersede the old rule against a "possibility on a possibility," as to limitations of real property. In the principal case, the court cites a dictum in *Routledge* v. *Dorril* (1794) 2 Ves. Jr. 357, to the effect, in a case substantially similar, that, while an appointment to grandchildren unborn at the grantor's death was void, as violating the rule against perpetuities, it would be valid if confined to issue living at the grantor's death. See *Robert* v. *West* (1854) 15 Ga. 122, at 142, *accord*.

PLEADING AND PRACTICE—LUNATIC NOT ADJUDGED INSANE—RIGHT OF NEXT FRIEND TO SUE. The plaintiff obtained an order to file a bill in the name of a lunatic who had not been adjudged insane, and had no conservator. After the bill was filed the lunatic appeared by an attorney, and moved to dismiss on the ground that she was a competent person. *Held*, a lunatic may sue by a next friend, and the court is not ousted of its jurisdiction by the motion of the incompetent, but may then inquire into his competency. *Isle* v. *Cranby* (Ill. 1902) 64 N. E. 1065.

In the absence of statutory prohibition a lunatic not adjudged insane is permitted to sue in his own name by a proper person appointed or recognized by the court as the "next friend." 16 *Am. & Eng. Enc.* 600; *Gray* v. *Park* (1892) 155 Mass. 433. The question then raised relates to the procedure the court should adopt in this peculiar situation of the parties. The sole issue is the competency of the lunatic. This should usually be determined by a jury, but in certain cases it may be determined by the court. *Howard* v. *Howard* (1888) 87 Ky. 616; *Pyott* v. *Pyott* (1901) 191 Ill. 280.

PLEADING AND PRACTICE—SERVICE ON FOREIGN CORPORATION. A statute required foreign insurance companies to designate an officer for service of process by a stipulation, filed with the insurance commissioner, to be "irrevocable so long as any liability of a company remained outstanding in the State." *Held*, the company could not revoke the designation as to one who insured while it was in force. *Magoffin* v. *Mutual Reserve Life Ass'n* (Minn. 1902) 91 N. W. 1115.

The court's assertion of jurisdiction, based on the statute, in an action *in personam* against a non-resident, not voluntarily appearing, is contrary to the United States Supreme Court decisions. *Pennoyer* v. *Neff* (1877) 95 U. S. 714; *St. Clair* v. *Cox* (1882) 106 U. S. 350. But the defendant had continued to collect premiums, and it is held that the collection of premiums upon insurance effected prior to the exclusion or withdrawal of the company from the State is a sufficient transaction of business to continue the designation for service, made under a statute, in actions *in personam*. *Connecticut Mutual Life Ins. Co.* v. *Spratley* (1899) 172 U. S. 602. The provision of the statute is treated as a condition of doing business within the State, and not as a contract. The power of the State to impose such conditions is defined in *Hooper* v. *California* (1894) 155 U. S. 648.

QUASI CONTRACTS—RECOVERY OF LOAN ULTRA VIRES—INTEREST. A building and loan association, unauthorized by its charter, received money as a deposit from one of its members, agreeing to pay six per cent. interest. *Held*, the depositor could recover in *quasi* contract for money had and received, with interest only from the time when demand was made for the payment of the principal. *Brennan* v. *Gallagher* (Ill. 1902) 65 N. E. 227.

As to the interest, this seems, on principle, to be wrong. When an innocent defendant receives money by mistake the cause of action arises and interest begins to run when he discovers the mistake or when restitution is demanded by the plaintiff. But here the money was not paid by the plaintiff to discharge a supposed obligation. The defendant cor-

poration borrowed it and agreed to pay interest for its use. It had actually used the money for its own benefit. Furthermore, it was constructively in default from the beginning, for the officers of a corporation are presumed to know its charter, and hence, in this case, to know they were acting *ultra vires*. There is little authority on the subject, but this conclusion is supported by *Dill* v. *Wareham* (1844) 7 Met. 438; *Leather Man'f's Bank* v. *Merchants' Bank* (1888) 128 U. S. 26; Keener on Quasi Contracts, p. 146.

REAL PROPERTY—WATERS—UNDERGROUND WATER FLOWING IN DEFINED BUT UNKNOWN CHANNELS. The plaintiffs were the owners of certain mills on a stream of which one of the principal feeders was a spring arising on the defendant's land. By sinking shafts nearby the defendants had materially diminished the flow of the spring. The plaintiffs alleged that the waters issuing from the spring previous to their emergence flowed in a well-defined and ascertainable channel under the surface. The assertion rested on scientific inference, and the course of the channel was unknown. *Held*, there are no rights in underground water when the course of its channel is unknown. *Bradford Corporation* v. *Ferrand* [1902] 2 Ch. 655. See NOTES, p. 109.

TORTS—LIABILITY OF AN AGENT TO THIRD PERSONS FOR NONFEASANCE. The defendant was an agent authorized to keep a building in repair. He had undertaken the duty, and had complete control. Through his failure to repair the railing of a veranda the plaintiff was injured. *Held*, an agent who undertakes the responsibility of keeping premises in repair owes a duty to so keep them, not merely to his principal, but also to third persons, and is liable to such third persons for injuries resulting from his nonfeasance. *Lough* v. *Davis* (Wash. 1902) 70 Pac. 491. See NOTES, p. 116.

TRUSTS—GIFT MORTIS CAUSA—DELIVERY. A, thinking he was about to die, told his son to pay A's wife, who was present, the amount of a debt owing by his son to him. *Held*, by CARLAND, J., there was a good gift *mortis causa*; by SANBORN, J., there was a good assignment of a chose in action. THAYER, J., dissented from both propositions. *Castle* v. *Persons* (C. C. A., 8th Circ. 1902) 117 Fed. 835.

Upon the question of assignment, the judges drew different inferences in regard to the intention. Upon the question of gift *mortis causa*, the dissenting opinion is the sounder. Delivery, actual or constructive, is essential to a gift *mortis causa*. *Irons* v. *Smallpiece* (1819) 2 B. & Ald. 551. A chose in action may be the subject of such a gift if it is a written instrument. *Snellgrove* v. *Bailey* (1744) 3 Atk. 214; *Chase* v. *Redding* (1859) 13 Gray, 418. But in the principal case there was nothing capable of delivery.

WILLS—INCORPORATION BY REFERENCE—EFFECT OF CODICIL. The testator bequeathed certain articles "to such of my friends as I may designate in the book or memorandum which will be found with this will." No memorandum was in existence at the time the will was executed; but the testator made one a few years later. Thereafter he executed a codicil, in which, after some dispositions not affecting the foregoing bequest, he stated that in all other respects he confirmed his will. *Held*, the memorandum was not incorporated into the will. *In the goods of Smart*, [1902] P. 238.

A paper or document, in order to be incorporated into a will, must both be referred to therein as then existing, and in fact exist, when the will is executed. If only the latter requirement is unfulfilled, the defect is cured if a codicil is made subsequent to the drawing up of the paper, since the will is regarded as speaking as of the date of the codicil, at which time the paper does exist. *In the goods of Truro* (1866) L. R. 1 P. & D. 201. If, however, the language of the will fails to describe the document as existing, a general confirmatory codicil is evidently of no avail. *In the goods of Reid* (1868) 38 L. J. P. & M. 1. The present case comes within this rule.

WILLS—MISTAKE—PROBATE. Under an erroneous impression that the testatrix had only an undivided moiety of some property, whereas in fact she possessed the entire interest, her solicitor drew the will in a certain way, and in that form it was executed. The testatrix, however, had not read the will before signing it. *Held*, probate would be granted with the erroneous words stricken out. *Briscoe* v. *Baillie Hamilton*, [1902] P. 234.

The rule is clear in England that if the will was neither read to the testator, nor read by him, before execution, mistake may be shown in the probate court. *Morrell* v. *Morrell* (1882) 7 P. D. 68; *In the goods of Boehm*, [1891] P. 247. But dispute has arisen whether, if the will was read, there is a conclusive presumption against mistake. Sir J. P. WILDE held affirmatively in *Guardhouse* v. *Blackburn* (1866) L. R. 1 P. & D. 109, while Lord CAIRNS denied the soundness of this ruling, *obiter*, in *Fulton* v. *Andrew* (1875) L. R. 7 H. L. 448. Later English cases seem to follow *Guardhouse* v. *Blackburn*. *Harter* v. *Harter* (1873) L. R. 3 P. & D. 11; *In the goods of Chilcott*, [1897] P. 223. While there are few probate cases in America, it has been said that a probate court may reject mistaken clauses. *Sherwood* v. *Sherwood* (1878) 45 Wis. 357. Some courts have held that equity may reform mistakes. *Wood* v. *White* (1850) 32 Me. 340; *Whiteman* v. *Whiteman* (1898) 152 Ind. 263. But this is against principle as the substituted portions have never been formally executed, *Newburgh* v. *Newburgh* (1820) 5 Madd. 364, and the weight of authority is against it. *Avery* v. *Chappell* (1826) 6 Conn. 270; *Goode* v. *Goode* (1856) 22 Mo. 518; *Sherwood* v. *Sherwood*, *supra*.